U.S. Department of Labor Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: October 22, 1997
Case No.: 95-INA-00446

In the Matter of:

LA FONDA,
Employer

On Behalf Of:

SALVADOR HERNANDEZ,
Alien

Appearance: Roger J. Gleckman, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 27, 1993, La Fonda, Employer, filed an application for alien employment certification to enable Salvador Hernandez, Alien, to fill the position of Musician (Mariachi). The duties of the job were described as follows:

> Will perform in restaurant specializing in Mexican style food and entertainment. Perform musical numbers as member of the Mariachi band "Los Camperos." Play the trumpet as well as sing traditional Mexican songs in Spanish. Wear the traditional Mariachi suit that identifies members of the band. Follow director's instruction and also give ideas for musical arrangements.

The Employer required that applicants have two years of experience in the job offered. The hours of employment are 7 p.m. to 2:30 a.m., 40 hours per week (AF 60).

The CO issued a Notice of Findings (NOF) proposing to deny certification on August 3, 1994 (AF 53-58). The CO stated that it does not appear that there is a permanent, full-time job opening to which U.S. workers can be referred. The CO stated that employment in the musical industry is temporary by nature. The CO requested rebuttal documenting that a permanent, full-time unfilled job exists for a musician. The CO advised that the most convincing evidence would be a contract between the Employer and the musician for two years at 40 hours per week guaranteed, unless the Employer can document that lesser terms are considered permanent and full time in the industry. The CO also stated that it is unlikely that the musician could work for 7½ hours and rehearse one to two hours daily.

The CO also stated that the Employer had improperly advertised the job in the Los Angeles Times after having been told by the State Employment Officer to advertise in the Daily Variety or the Hollywood Reporter. The Employer was directed to readvertise.

The Employer, by Counsel, submitted rebuttal dated September 27, 1994 (AF 30-44). The rebuttal contained a letter from a business representative of Musician's Union Local 47, stating that the Employer has had a contract with the Union for approximately 20 years; that members of the Mariachi band are usually required to be union members; and, that the definition of full-time employment under the terms of the contract is 4½ hours per day for four days per week (AF 44).

Counsel stated that the Employer had complied with the CO's readvertisement instruction by placing an advertisement in the Hollywood Reporter for three days.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued a Final Determination denying certification on December 14, 1994 (AF 27-29). The CO determined that no documentation had been offered in the union representative's letter as to what actually constitutes permanent employment. The Employer's rebuttal was judged to be inadequate to rebut the NOF.

Discussion

The issue is whether the offered job constitutes permanent, full-time employment. Employment is defined as "permanent full-time work by an employee for an employer other than oneself." 20 C.F.R. § 656.50. It is well settled that the employer bears the burden of proving that a position is permanent and full time. *Gerata Systems America, Inc.*, 88-INA-344 (Dec 16, 1988).

The Employer advertised a 40-hour work week, from 7 pm to 2:30 am, with occasional overtime. The CO questioned the permanency of the position since musicians tend to work temporarily at jobs. The CO suggested that a two-year contract with the Alien would be proof of permanent employment. However, the Employer could establish the industry standard for permanent employment, if it were for a shorter term.

In rebuttal, the Employer did not offer proof of an employment contract with the Alien, but rather a letter from a musician's union's representative who stated that the Employer has had a contract with the Union for approximately 20 years and that Mariachi musicians are usually members of the union. The representative stated that the union contract with the Employer requires that union musicians be paid scale wages for a minimum of 4½ hours per day for a minimum of four days per week. The union representative interprets these requirements as establishing the definition of full-time employment.

Contrary to the union representative's undocumented assertions, the union contract with the Employer does not establish the industry criteria for permanent, full-time employment of musicians. It only sets the minimum period of time for which union musicians must be paid per day and per week, and the minimum wage that must be paid when the musician works. The Employer did not attempt to establish that the job is permanent by offering into the record a contract to employ the Alien on the basis of the terms of the job offer for two years as suggested by the CO, or for any definite period of time. The Alien has no obligation to remain with the petitioning Employer for any specific period of time. In view of the temporary nature of musical employment, we agree with the CO that the Employer has not established that the offered job is permanent employment as required by the regulations.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

Judge Holmes, dissenting.

I respectfully dissent. Employer has furnished documentation from the local union stating that based on 20 years of experience, Mariachi musicians are full-time employees. The CO had issued an arbitrary finding that musicians usually have temporary work. I believe the Employer has sufficiently rebutted the CO's request for alternative documentation, and that had the CO not been satisfied, he should have issued a new NOF asking for further documentation or otherwise finding the application deficient. The requirement of a two-year contract to show good faith full-time employment has rarely, if ever, been required of Employers in other situations who have a less specific skill to offer. Further, I question the CO's assumption that a Mariachi trumpeter will not seek permanent employment. What else will he do? What U.S. worker's job will he take away? I would remand.

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JOHN C. HOLMES
Administrative Law Judge